IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

RSA No.176/1982

Reserved on : 5.10.2007

Decided on.5.11.2007

Smt. Ajudhia alias Jasodhan and others. …Appellants.

Versus

Chandu and others. …Respondents

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*. No*

For the Appellants : Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.

For the respondents : Mr. Ramakant Sharma, Advocate.

Rajiv Sharma, J.

A challenge has been laid to the judgment and decree passed by the learned Additional District Judge, Mandi in CA No.124/91.

The brief facts necessary for the adjudication of this second appeal as culled out from the pleadings of the parties are that one Smt. Bohtu filed a civil suit initially for declaration and permanent injunction by way of consequential relief, in the alternative a prayer for possession was also made. She died during the pendency of the suit. The legal representatives of Smt. Bohtu were brought on record. The learned Senior Sub Judge framed the following issues:

1. **Whether the plaintiffs are in possession of the suit property under a valid will from Smt. Biharu deceased?**

OPP.

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No

2. **Whether Smt. Biharu was in possession of the suit property since the death of Garja till her lifetime? OPP.**
3. **Whether the defendant No.1 has remarried Khazana after the death of Garja. If so, its effects? OPP**
4. **Whether the defendant No.2 is the daughter of Garja deceased. If so, its effects. OPD**
5. **Whether plaintiff No.2 is the lawful heir of Garja deceased? OPP**
6. **Whether the plaintiff and Garja deceased are governed by the customs in matters of alienation and successions. If so, what are that customs and its effect? OPP**
7. **Whether the plaintiffs are entitled to the possession of the suit property? OPP**
8. **Whether the plaintiffs are estopped from filing this suit? OPD**
9. **Whether the suit is properly valued for court fee and jurisdiction? OPP**
10. **Whether the entries in the revenue records as alleged in favour of the defendant qua the suit property are wrong and not binding on the plaintiff? OPP**
11. **Whether defendant No.2 is a minor? OPP**
12. **Relief.**

One additional issue was also framed on 6.7.1971, which reads thus:

11 (a). Whether the plaintiffs are entitled to recover the compensation from the C.O. Bilaspur as alleged?

The learned Senior Sub Judge vide judgment and decree dated 28.8.1979 decreed the suit in favour of the respondents-plaintiffs (hereinafter referred to as the plaintiffs for convenience sake) to the extent that they were owners of the shares as specified in the title of the plaint on account of a valid will having been executed by Smt. Biharu in favour of Bohtu and that the appellants-defendants (hereinafter referred to as the

defendants for convenience sake) had no right, title and interest in those shares of the plaintiffs in the suit land and they were also held entitled to possession of the suit land to the same extent as for relief to declaration. The suit of the plaintiff qua the remaining reliefs was dismissed. The defendants filed appeal against the judgment and decree passed by the learned Senior Sub Judge bearing CA No. 24 of 1981 in the Court of learned Additional District Judge, Mandi. Learned Additional District Judge, Mandi upheld the judgment and decree of the learned Senior Sub Judge vide judgment dated 12.2.1982. The present appeal was preferred before this Court on 24th August, 1982. The appeal was admitted on 5th November, 1982. Since the appellate court i.e. the learned Additional District Judge, Mandi and Bilaspur had failed to record its findings on all issues, this Court vide order dated 1st May, 1981 called for the findings of the lower appellate court on the following points:

1. **Whether Premi, defendant No.2 who had been held to be the daughter of deceased Garja had succeeded to the estate of deceased as such?**
2. **Whether suit of the plaintiff was barred by time as contended by the defendants, especially in view of the admissions of defendant No.1 continuing in possession of the suit property?**
3. **Whether Ajudhya defendant No.1 had on remarriage with Khazana on the 16th day of the death of her husband forfeited her rights to the property? If so, its effect.**

The learned appellate court returned the findings on 11.10.1991 on the points referred to it by this Court. This Court vide order dated 12.3.1992 directed the parties after the receipt of the findings recorded by the lower appellate court to file objections, if any, within a period of two weeks. The objections were filed by the appellants. The second appeal was allowed by this Court on 13th January, 1993. The plaintiffs feeling

aggrieved by the judgment and decree passed by this Court dated 13th January, 1993 filed civil appeal No. 2163/1994 before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide judgment dated 10th October, 2001 allowed the appeal and the judgment of this Court dated 13th January, 1993 was set aside and the matter was sent back to this Court to be decided in accordance with law.

The Court framed the following substantial questions of law on 13.3.2002 which reads thus:

1. **Whether the Courts below have misread and mis-appreciated the evidence on record to come to the conclusion that defendant No.1 had remarried with Khazana and as a consequence thereof forfeited her rights to his property?**
2. **Whether Premi defendant No.2 who has been held to be a daughter of deceased Garja by both the Courts below had no right to succeed to the estate of her father, as per the custom?**
3. **Whether the Will in question is proved to be executed in accordance with law and valid Will?**

Since all the three substantial questions are interconnected, therefore, the same are taken up together for determination.

The Court will first determine whether the will executed by Smt. Biharu in favour of Smt. Bohtu dated 18.8.1967 (Ex.PW-2/A) was validly executed or not. The will dated 18.8.1967 was registered in the office of Sub Registrar. The Sub Registrar had appeared as PW-2. He had stated that the will in question was presented for registration by Smt. Biharu, who at that relevant time was of a sound mind. He had further testified that the contents of the will were read over to Smt. Biharu and she admitted the same to be correct and thereafter he made his endorsement on the will. He then testified that Smt. Biharu put her thumb impression, who was identified by Sh. Ram Singh, Lambardar, who was personally known to

him. The will was scribed by Document Writer Sh. Gurditta Mal. Sh. Gurditta Mal died and his Sh. Nand Lal appeared as PW-1. He had produced the relevant register in which his father had made the entry. He deposed that the will was registered at Sr. No. 1320 in the original register i.e. Ex.DA. Shri Bardu Ram had appeared as PW-4 who was the attesting witness to the will dated 18.8.1967. PW-5 Sh. Ram Singh Lambardar had identified Smt. Biharu before the Sub Registrar, Bilaspur. DW-2 in his statement had stated that Smt. Biharu was suffering from paralysis two years prior to her death. DW-3 Sh. Dila Ram had stated that she lost her senses 3-4 years prior to her death. It is thus evident on the basis of the statements made by PW-1, PW-4 and PW-5 coupled with the original register that the will dated 18th August, 1967 was validly executed by Smt. Biharu in favour of Smt. Bohtu.

The next question requiring consideration is whether Smt. Ajudhiya was remarried to Sh. Khazana after the death of her husband. PW-3 Sh. Chandu Ram had testified that Smt. Ajudhiya after the death of Garja had performed Nath Chadar ceremony and she remarried to Khazana and they had been living together as husband and wife. PW-6, Sh. Achharu Ram had stated that when he visited the house of Garja on his death on 16th day, there was Nath Chadar ceremony between Ajudhiya and Khazana and thereafter she had been residing with Sh. Khazana Ram. DW-1 Smt. Ajudhiya had denied that she ever performed/solemnized her marriage by Nath Chadar with Sh. Khazana Ram though she had admitted the birth of her sons to Sh. Khazana in his house. Khazana Ram, who appeared as DW-2 also denied the factum of marriage with Ajudhiya. DW-3 Sh. Dila Ram had supported the version of DW-1 and DW-2.

The conclusion which can be drawn from the statements of the witnesses as well as on the basis of the documentary evidence is that Sh. Khazana Ram and Smt. Ajudhiya had been living together as husband and wife.

The only question which now requires the determination by the Court is whether Premi had right to succeed to the estate of her father as per the custom or not. As per the custom prevalent in the illaqua, Premi was not entitled to succeed to the property of Garja. She became entitled to the property on the death of Smt. Biharu. Smt. Biharu had already executed a will on 18th August, 1967 in favour of Bohtu. Consequently Smt. Premi was not entitled to get any property.

DW-1, DW-2 and DW-3 i.e. Smt. Ajudhiya, Khazana and Dila Ram had categorically admitted in their statements that in those days on the death of the father, the daughter did not inherit the estate of her father. It is evident from the reading of Ex.P-20 in its entirety that in cases pertaining to Bilaspur in matter of succession the Rajputs were governed by custom by which daughters were excluded from the succession by collateral. This fact is further fortified by a judgment in case Mst. Maro Vs. Paras Ram, AIR 1966 HP 22 wherein it has been held as under:

> **"The learned Senior Subordinate Judge, Bilaspur, who had tried the suit, held that the parties were governed by custom, and not by Hindu Law in matters of succession and that according to custom, prevalent in Bilaspur, respondents Nos. 1 to 3 excluded appellant No.1 from inheritance of Gokal. The suit of respondents Nos.1 to 3 was decreed, subject to the payment of Rs. 600 to respondent No.5. The finding and decree of the Senior Subordinate Judge were affirmed, on appeal, by the learned District Judge, Bilaspur.**
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> **The appellants have come up in second appeal. There was an office objection that the appeal was barred by time. By its**

order dated 13.7.1962, this Court held that the appeal was within time.

As already stated, the only question, argued in the appeal, was whether according to custom, a daughter was excluded from succession, by near collaterals. It was contended, on behalf of the appellants, that the evidence, adduced by respondents Nos.1 to 3, did not establish any custom excluding a daughter from the inheritance of her father by collaterals, and that both the lower Courts erred in holding that respondents Nos. 1 to 3 had established the custom, alleged by them. The contention does not appear to be well founded. The burden was, no doubt, on respondents Nos. 1 to 3 to establish the custom, set up by them. This burden was, all the heavier when the custom set up adversely affected the rights of females. But the respondents had discharged that heavy burden, by adducting satisfactory evidence in support of the custom that a daughter was excluded by collaterals. Gokal was a Rajput Ganu PW-1, Hari Man PW-2. Hari Singh PW-3 and Chhanga PW-4 stated that the predominant occupation of the Rajputs was agriculture and that they cultivated lands for themselves. It was further stated by the witnesses that Rajputs are land owners and supply Lambardars. Balak Ram DW-3also admitted the above facts. In the suit, instituted by respondent No.1 and the father of respondents Nos. 2 and 3, for setting aside the alienation made by Smt. Chukhri in favour of respondent No.5, it was held that Smt. Chukhri was governed by custom in matters of alienation. The four witnesses of respondents Nos.1 to 3 had stated that in matters of alienation and succession Rajputs were governed by custom and not by Hindu Law. The above evidence established that in matters of alienation and succession Gokal and the parties to the suit were governed by custom and not by Hindu Law.

Ganu PW-1 Hari Man PW-2, Hari Singh PW-3 and Chhanga PW-4 stated that according to custom prevalent in Bilaspur a daughter was excluded, from the inheritance of her father, by near collaterals. Hari Man PW-2 cited an instance of the exclusion of daughters. Hari Man stated that Smt. Barfo had three daughters but that after her death, Chaudhary, her

husband's brother's son succeeded to the estate, to the exclusion of daughters. Ex.P-7, a copy of the mutation, effected after the death of Smt. Burfo, corroborates the statement of Hari Man. Chhanga PW-4 also cited an instance of the exclusion of daughters by a collateral. Ex.P8 and Ex.P9, copies of judgments, are not relevant for the purposes of the present case, as in Ex.P-8, an alienation by a male was in dispute, and in Ex.P-9 an alienation by a widow in favour of strangers, was in dispute. In none of those cases, the contest was between a daughter and a collateral.

Ex.P10 is a copy of the judgment, in a case, brought by a collateral, for setting aside a gist, made by a widow in favour of her daughter. In this case, it was held, by the Court, that according to custom a daughter was excluded from inheritance by a collateral and the gift was set aside. Ex.P11 is a copy of the judgment in a case, brought by collaterals for setting aside a gift made by a widow in favour of her daughter's son. In this case, also, it was held that neither a daughter nor a daughter's son could succeed in the presence of near collaterals. Ex.P12, Ex.P-13 and Ex.P-14 are copies of judgments in cases, were a widow had made a gift in favour of her daughter, and the collaterals had brought a suit for setting aside the gift. It was held in all these cases that collaterals excluded a daughter from inheritance according to custom.

Respondents Nos. 1 to 3 had also produced a copy of a judgment of this Court delivered in RSA No. 9 of 1953. That case related to Bilaspur district and it was held that the parties in that case were governed by custom by which daughters were excluded from succession by collaterals. In that case five instances of daughters being excluded by collaterals were cited. The judgment of this Court in RSA No. 9 of 1953 (Him. Pra.) is not only relevant under sections 13 and 42 Evidence Act, as forming in itself a transaction by which the custom in question was recognized, but is also relevant to show that it contains five specific instances relating to the custom of exclusion of daughters vide Mt. Subhani v. Nawab, AIR 1941 PC 21. Ramji Dass DW-1 admitted that according to custom prevalent in Bilaspur a daughter was exclused from

succession by collaterals. The admission made by this witness was an important piece of evidence as he had been working in the erstwhile Bilaspur State for the last 40 years as a petition-writer and was well acquainted with the customs prevalent in that State.

As against the above evidence adduced by respondents Nos.1 to 3, with respect to the custom of exclusion of daughters the appellants could not prove a single instance in which a daughter had excluded near collaterals. EX.DW4/E is a copy of the judgment in case brought by collaterals for setting aside a gift made by a widow in favour of her daughter. The suit was dismissed on the basis of a compromise entered into on 20.12.1956. It may be that as the Hindu Succession Act had come into force the collaterals thought it expedient to compromise the suit. In any case no finding was recorded that a daughter excluded collaterals. Ex.DW-4/E cannot be regarded as an instance of exclusion of collaterals by a daughter. EX.DW-4/A is a copy of the judgment in a suit, brought by a daughter for setting aside an order of the Government escheating the state of her father. The suit was decreed. In this case, there was no contest between a daughter and a collateral. The contest was between the daughter and the Government.

Ex.DW-4/B and Ex.DW.4/C are copies of judgments in cases of pre-emption. A widow had sold properties to different vendees, who were not, in any way, connected with her husband's family. A daughter of the widow had brought two suits for pre-empting the sales. Her suits were decreed on the ground that she was an heir to the vendor and had a preferential right of pre-emption as against the vendees who were strangers. There was no contest in the suit between a collateral and the daughter. Some of the observations made in Ex.DW-4/B and Ex.DW-4/C go against the appellants. It has been observed in both the judgments that the vendees had established a custom that collaterals excluded daughter from inheritance. Similarly in the case copy of judgment Ex.DW-4/D, there was no contest between a daughter and a collateral. The evidence adduced by the appellants did not in the least

rebut the evidence adduced by respondents Nos.1 to 3 in support of the custom that daughter was excluded from succession by near collaterals.

The learned counsel for the appellants contended that the evidence adduced by respondents Nos. 1 to 3 did not establish the custom set up by them. He urged various grounds in support of his contention. The first ground urged by him was that the instances of exclusion of daughters adduced by respondents Nos. 1 to 3 were not the result of any custom prevalent in Bilaspur but daughters were excluded from inheritance under the Lawarsi Rules which had the force of a statue. The Lawarsi Rules were embodied in two Robkars of 1982 and 1995 Sambat. This Court had the occasion to consider the two Robkars in Jindu v State, AIR 1957 Him Pr. 61. It was held by this Court that the two Robkars were mere departmental instructions meant for the guidance of the revenue officers and did not amount to a statute. It will not, therefore, be correct to say that the Lawarsi Rules had the force of law and that the daughters were excluded under those Rules and no under custom. Moreover, Lawarsi Rules dealt with cases of escheat by Govt. and the disposal of escheated property. Those Rules did not govern succession to the estate of a proprietor. The Lawarsi Rules could not be an impediment in the way of a daughter to succeed to the estate of her father if she had otherwise the right to do so. The exclusion of daughters from succession in the instances proved on behalf of respondents Nos.1 to 3 cannot be attributed to Lawarsi Rules but is to be attributed to custom.

The second ground urged by the learned counsel for the appellants was that most of the instance adduced on behalf of respondents Nos. 1 to 3 related to Brahmans and that those may be relevant to prove a custom applicable to Brahmans but cannot be relied upon for proving a custom applicable to Rajputs. The learned counsel in this connection pointed out that Bilaspur District was inhabited by different tribes and customs differ from tribe to tribe. It is true that custom cannot be extended by analogy and that customs of one tribe may differ from those of another tribe. But in the present case

witnesses had stated that custom with respect to succession was the same amongst Brahmans and Rajputs. In view of this evidence, instances relating to the exclusion of daughters amongst Brahmans can be relied upon for proving a custom amongst Rajputs.

The third ground urged by the learned counsel for the appellants was that a custom adversely affecting the rights of females cannot be said to have been established unless instances were brought on record in which females had asserted their right to succeed but that right was rejected by the Courts and that such instances were lacking in the present case. Learned counsel placed reliance on the following observations made in Mt. Sarifa Begam v. Court of Wards, AIR 1940 Lah 475:

"It is well known that female heirs seldom contest their inheritance with male heirs and that mothers and sisters are always complaint enough not to insist on their pound of flesh. It is in such circumstances that this Court as well as its predecessor the Punjab Chief Court and Courts in other provinces too have held that such instances are not sufficient to determine that the parties do not follow their personal law unless there has been a clear demand and refusal."

In the present case, the context in between a daughter and collaterals and not between a mother and a son or between a brother and a sister. Moreover six judicial decisions have been brought on record in which daughters had asserted their right to succeed to the estate of their father against the collaterals but that right was not accepted by Courts. In those cases daughter's right to succeed was denied by collaterals.

The last ground urged by the learned counsel for the appellants was that the custom of the exclusion of daughters was not proved to be ancient and was, therefore, not a valid one. It is true that a custom to be binding must be ancient. But the English rule that "a custom in order that it may be leal and binding must have been used so long that the memory of man runneth not to the contrary" is not applicable to Indian conditions. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and

with such invariability as to show that it has by common consent been submitted to as the established governing rule of a particular district vide AIR 1941 PC 21 (supra). The evidence adduced by respondents Nos.1 to 3 established that the custom of exclusion of daughters has been acted upon for a sufficiently long time in Bilaspur District. The fact that not a single instance was cited where a daughter had excluded collateral from succession proved that the custom of exclusion of daughters was uncontroverted and well recognized. It is, therefore, to be held that respondents Nos. 1 to 3 had proved that the custom of the exclusion of daughters in Bilaspur District was ancient in the sense in which the word, "ancient" has been interpreted in AIR 1941 PC 21 (supra)."

There is proper appreciation of the oral as well as documentary evidence by both the courts below. The findings recorded by both the courts below are liable to be upheld.

Consequently there is no merit in the second appeal and the same is dismissed with no order as costs.

(Rajiv Sharma), Judge

November 5, 2007
Awasthi